No. 98-387

In The

Supreme Court of the United States

October Term, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, AMERICAN CIVIL LIBERTIES UNION, MAGAZINE PUBLISHERS OF AMERICA, INC., THE MEDIA INSTITUTE, NATIONAL NEWSPAPER ASSOCIATION, NEWSPAPER ASSOCIATION OF AMERICA, and OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amici Curiae are broadcasters, publishers, advertisers, and citizens with a deep commitment to the values of free speech.[1] America's media are the conduit through which a significant amount of commercial information is conveyed to the public. Advertising, as this Court repeatedly has recognized, is itself a valuable form of speech. Furthermore, advertising revenues provide the fundamental financial support for the media's ability to gather and report the news, comment on political and other public events, and disseminate other forms of speech universally recognized as vital to a fully-informed public and the proper functioning of our democratic form of government.

Amici, first and foremost, support full protection under the First Amendment to the United States Constitution for the marketplace of ideas in which citizens receive information and make informed decisions. Broadcasters, publishers, and advertisers are active participants in that marketplace as speakers, as the means by which other speakers may be heard, and as the vehicle for educating citizens to participate effectively in public and private decisionmaking. *Amici* support protection for commercial speech as an important part of the marketplace of ideas, providing an unimpeded flow of truthful, nonmisleading speech about lawful products. The media are a major link between speakers (including advertisers and the businesses they represent) and their audience (consumers), and the First Amendment was intended to foster the interests of both.[2] *Amici*, therefore, support First Amendment

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[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support. Individual *amici* are described in the Appendix to this brief.

[2] "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,

protection of truthful and nonmisleading commercial speech concerning lawful products, services, and activities, including gambling. The ability of advertisers to disclose and consumers to receive information about such activities is instrumental to making fully informed decisions. Governmental restrictions on the public availability of that information, such as the advertising ban at issue in this case, undermine not only the market for a particular product or service but also the discussion about public policy issues concerning that product or service.

The continuing efforts of government at all levels – federal, state, and local – to advance social policy goals by suppressing speech and keeping citizens in ignorance demand constant vigilance, not only from the courts but from those individuals and organizations, like *Amici*, who inform and educate the public and monitor First Amendment protections. Restrictions on truthful and nonmisleading advertising of lawful gambling activities are directly contrary to the theory of unfettered access to information on which our society is based. *Amici* urge the Court to provide unambiguous, prescriptive guidance to both the lower courts and governmental entities that will effectively prohibit the Government's paternalistic efforts to use public ignorance as a means of influencing citizens' thoughts and behavior.

SUMMARY OF ARGUMENT

The vital role of the courts in holding Government to its First Amendment burden of proof in defending commercial speech regulations is a central theme of the Court's commercial speech cases. Under the *Central Hudson* test, particularly as it has been enhanced in recent cases, the Government not only must prove that its purposes in restricting commercial speech are legitimate and substantial, but that the restriction

757 (1976). A consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

directly and materially advances those purposes and is narrowly tailored to be no more extensive than necessary to achieve the Government's goals, considering alternative regulations with no, or less, impact on speech. The Fifth Circuit in this case has attempted to avoid this searching inquiry in an effort to uphold restrictions on what some consider to be "undesirable" communications. As explained more fully below, this and similar cases demonstrate the need for this Court to once again admonish the lower courts that the First Amendment embraces just such speech.

The need to so instruct lower courts unfortunately has heightened, rather than abated, in the wake of the Court's most recent commercial speech decision, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). While the result was unanimous and the Justices' separate opinions confirmed the Court's continued commitment to enhancing such protection, many lower courts are failing to heed the Court's direction, distinguishing the Court's most recent decisions and selectively citing segments of earlier opinions to support a diluted constitutional analysis. Here, for example, the Court expressly directed the Fifth Circuit to reconsider its decision in light of *44 Liquormart*, yet the court of appeals reaffirmed that decision, refusing to draw any significant guidance from *44 Liquormart*.[3] Adequate First Amendment protection for

[3] The Fifth Circuit majority opined that "after *44 Liquormart*, what level of proof is required to demonstrate that a particular commercial speech regulation directly advances the state's interest is unclear," 149 F.3d at 337. The court continued to rely on discredited portions of this Court's earlier commercial speech jurisprudence to reaffirm its prior decision, claiming that "*44 Liquormart* does not undercut this reasoning." *Id.* at 340. The Fifth Circuit is not alone in failing to adhere to the mode of analysis required after *44 Liquormart*. *See, e.g., Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 328-29 (4th Cir. 1996) (on remand for reconsideration in light of *44 Liquormart*, reaffirming decision upholding outdoor advertising ban by purporting to distinguish *44 Liquormart* as limited to "narrowest" proposition "that keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising does not further any

commercial speech remains in jeopardy as long as the lower courts feel free to take two steps back rather than follow this Court's most recent steps forward.

The Government has a limited, if any, interest in banning advertising of private casinos. States, rather than the federal government, regulate gambling activities, and the vast majority of them permit, and in many cases promote, such activities. Moreover, the federal government has taken no steps to discourage, and in fact encourages, Indian Tribal gaming. The Government's nationwide attempt to keep the public in selective ignorance is unrelated to any "commercial harms" of market fraud and overreaching and is inconsistent with the very "federalism" interest it earlier asserted in support of an identical advertising ban. Nor can the Government assert a substantial interest in protecting the most vulnerable potential

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legitimate end"), *cert. denied*, 117 S. Ct. 1569 (1997); *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 101 F. 3d 332 (4th Cir. 1996) (companion case), *cert. denied*, 117 S. Ct. 1569 (1997); *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp. 2d 1225, 1228 (W.D. Wash. 1998) (questioning *44 Liquormart* because "no rationale was able to garner a majority"); *Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137 (N.J. 1998) (purporting to distinguish *44 Liquormart* as applicable only to total speech bans, and holding "the government does not have a heavy burden to satisfy" second prong of *Central Hudson* test). Even some courts that have protected commercial speech have minimized the value of *44 Liquormart* and applied a less vigorous analysis than required by this Court. *See, e.g., Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1332 (9th Cir. 1997) (striking down ban on casino gambling advertising, but deferring to presumption – discredited in *44 Liquormart* – that government's interest in discouraging public participation in gambling is substantial enough to satisfy *Central Hudson*), *cert. denied*, 118 S. Ct. 1050 (1998); *Nordyke v. County of Santa Clara*, 933 F. Supp. 903 (N.D. Cal. 1996) (enjoining restriction, but finding *44 Liquormart* did not preclude reliance on presumptions that speech restriction furthered government interest), *aff'd*, 110 F.3d 707 (9th Cir. 1997); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 422-23 (D. Vt. 1998) (enjoining advertising restrictions but finding *44 Liquormart* gave "no clear statement of the test to apply . . . .").

recipients at the expense of the public as a whole. Government must *prove* that the harms it purports to address through commercial speech restrictions are legitimate and real. It has not done so in this case.

The Government also cannot *prove* that its advertising ban directly advances any arguably substantial interest to a material degree, particularly in light of the internal inconsistencies of the statute at issue in this case. Indeed, the Government failed to produce *any* evidence of direct and material advancement. Yet the Fifth Circuit majority relied on a conclusive presumption that advertising increases consumption to conclude that the Government satisfied this *Central Hudson* factor. This Court has rejected the concept of such an evidence-precluding presumption. The Fifth Circuit majority attempts to evade the Court's latest commercial speech cases in an effort to return to the days when the Government could ban such speech based on nothing more than a moral disagreement with its subject matter. The Court needs to reaffirm expressly that the Government cannot be relieved of its burden of proof through judicial deference to presumptions or legislative decisionmaking, and to instruct the lower courts that such deference would nullify the third *Central Hudson* factor.

Finally, the Government failed to produce any evidence to *prove* that its advertising ban is narrowly tailored to the asserted governmental interests. Numerous obvious alternatives exist to banning speech about gambling – including Government-sponsored counter-speech and regulation enforcement efforts – and Congress has established a commission to study and recommend just such alternatives. The Fifth Circuit majority, however, dismissed out of hand even the possibility that any alternatives could be effective and characterized the ban as a reasonable time, place, and manner restriction. This Court has soundly rejected such reasoning, requiring proof that alternatives to speech restrictions would be ineffective and requiring that a valid time, place, or manner restriction on speech be unrelated to the content of that

speech. The statute at issue here, which bans private casino advertising solely because of its content, is directly at odds with these requirements.

The Court has applied its *Central Hudson* analysis with increasing vigor in recent cases, yet the Fifth Circuit majority opinion amounts to a massive retreat to a time when Congress and State legislatures could curtail commercial speech with virtual impunity. The Court should refuse such an invitation to eviscerate First Amendment protection for commercial speech. Judicial deference to legislatures on matters of constitutional permissibility is fundamentally inconsistent with the intent of the Framers and the decisions of this Court. *Amici* urge the Court once again to reaffirm its commitment to strong protection for truthful, nonmisleading commercial speech about legal products and services, and expressly to require that Government be held to its burden to prove the constitutionality of any restrictions on such speech. The Fifth Circuit majority failed to do so here, and its decision should be reversed.

ARGUMENT

I. THE FIRST AMENDMENT STRONGLY PROTECTS COMMERCIAL SPEECH.

This Court has repeatedly stressed the value and significance of commercial speech since specifically extending First Amendment protection to such speech in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As the Court has observed, commercial speech is worthy of protection for many of the same reasons that other forms of speech are protected:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Id. at 765 (citations omitted).

Since that first recognition of the importance of commercial speech protection, the Court has continued to observe that "[t]he commercial marketplace, like spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).[4]

> [T]he Court, and individual members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.

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[4] *Accord, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420-21 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980).

44 Liquormart, 116 S. Ct. at 1517 (Thomas, J., concurring in judgment) (citations and footnote omitted).[5]

To ensure proper protection for these First Amendment objectives, therefore, the Court has carefully scrutinized Government regulation of commercial speech and has required that Government bear substantial factual burdens to justify all such regulation. *E.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-91 (1995); *Edenfield*, 507 U.S. at 767. Such scrutiny is no less demanding for speech that concerns so-called "socially harmful" or "vice" activities, including the advertising of lawful gambling activities now at issue before the Court in this case. The Court has unequivocally stated that nothing in its prior case law "compels us to craft an exception to the *Central Hudson* standard" for such speech. *Rubin v. Coors Brewing*, 514 U.S. at 482 n.2. Justice Stevens reiterated this conclusion in *44 Liquormart* and explained that "[a]lmost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity,' " and that "recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the 'vice' label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice." 517 U.S. at 514 (Stevens, J., plurality op.).

The Fifth Circuit majority in this case did not expressly disavow this Court's rejection of a "vice" exception to First Amendment protection for commercial speech, but plainly tailored its analysis to the nature of the activity the restricted speech concerns. The lower court openly expressed concern

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[5] Justice Thomas also observed that the Court infrequently has departed from strict application of these principles, *id.*, but has done so recently only in instances in which the government's interest was ensuring consumer protection from fraud and other forms of overreaching, rather than indirect regulation of the underlying activity. *See, e.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

that striking down the Government's commercial speech ban would subject citizens "to the influence of broadcast advertising for privately owned casinos" and "effectively awards federal sanction to an activity that is again coming to be viewed with moral and utilitarian suspicion." 149 F.3d at 340-41. The lower federal courts are not the nation's arbiters of morality, nor has this Court ever conditioned protection for the exercise of private citizens' free speech rights on whether the Government would be perceived as endorsing the subject matter of that speech. Analysis of commercial speech restrictions under the First Amendment is not a moral litmus test but a process in which the Government must prove that its restrictions are permissible, not merely rely on the assertion that the absence of such restraints would confer governmental approval of a controversial activity.

Truthful, nonmisleading commercial speech about a legal product or service is a valuable component in the marketplace of ideas, regardless of whether a segment of the population disapproves of that product or service. Indeed, commercial speech concerning a controversial product or service may be particularly valuable as a source of information or spark for public discussion about that product or service. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (abortion "advertisement conveyed information of potential interest and value to a diverse audience – not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter"). This Court's decisions prevent the Government from resorting to speech restrictions as the first method for attempting to achieve its goals. The Government accordingly bears the burden to prove that its ban on advertising for private casino gambling permissibly restricts commercial speech – a burden the Government has not carried.

II. THE GOVERNMENT HAS NOT IDENTIFIED A SUBSTANTIAL INTEREST THAT WOULD JUSTIFY RESTRICTIONS ON TRUTHFUL COMMERCIAL SPEECH ABOUT GAMBLING.

The Government does not maintain that commercial speech prohibited under its advertising ban concerns an illegal product or service or is inherently false or misleading. Because this initial factor of the Court's *Central Hudson* analysis is not at issue, therefore, the Government must prove that (2) a real and substantial interest underlies the Government's restriction on speech; (3) the restriction directly advances the Government's interest in a material way; and (4) the restriction is no more extensive than necessary to achieve that interest in light of available alternatives with less impact on speech. *E.g.*, *Rubin v. Coors Brewing*, 514 U.S. at 482. The interests asserted by the Government are unrelated to commercial harms and thus fail to satisfy the second *Central Hudson* requirement. Even if one or more of those interests could justify the casino advertising ban, the Government's asserted interests are questionable at best, and significantly impact the scope of the remaining *Central Hudson* analysis.

The Government has identified three interests that allegedly support its ban on advertising of private casino gambling: (1) discouraging public participation in gambling activity; (2) protecting states in which gambling is illegal; and (3) curbing abuse of gambling by compulsive gamblers. As an initial matter, none of these interests concerns protecting consumers from any "commercial harms" resulting from the advertising itself, as opposed to the legal gambling activities being advertised. These purported State interests represent governmental policy objectives directed to those gambling activities, not to any protection for consumers from overreaching, oppressive, or fraudulent communications.

> It is the State's interest in protecting consumers from "commercial harms" that provides "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an "underlying government policy" that could be implemented without regulating speech. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy.

44 Liquormart, 116 S. Ct. at 1508 (Stevens, J., plurality opinion) (quoting *Cincinnati v. Discovery Network*, 507 U.S. at 426 and *Central Hudson*, 447 U.S. at 566, n.9) (citations omitted). The Government, having failed to assert an interest in protecting consumers from commercial harms from casino advertising, has failed to identify any substantial interest that would justify its restrictions on commercial speech.

Even if the assertion of noncommercial interests could hypothetically satisfy the second *Central Hudson* factor, the Government's asserted interests in this case are questionable at best and thus are entitled to minimal, if any, weight on the *Central Hudson* scales. The Court has cautioned that it "must identify with care the interests the State itself asserts. Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 507 U.S. at 768 (citations omitted). The Government bears the burden to prove that the concerns "it recites are real." *Id.* at 771. The Government has not met its burden here.

The Government first asserts that it has a substantial interest in reducing overall public participation in gambling activities. Congress, however, effectively has left regulation of such activities to the States. States and local governments, in turn, have increasingly authorized, and sponsor, gambling activities.[6] These State and local governments have balanced

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[6] Thirty-seven states and the District of Columbia engage in state-sponsored lotteries, and private casinos and gambling activities are

the benefits and possible harms and concluded that permitting their citizens to participate in such activities is in the public interest. Most of these States also directly encourage public participation in State-sponsored lotteries and other gaming. In addition, Indian Tribal gaming, enabled by federal law, has become widespread in the past decade.[7] Under such circumstances, the Federal Government cannot legitimately claim an overriding interest in discouraging public participation in the very activities it has left to the States and Indian Tribes the authority to permit and promote. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 354 (1986) (Brennan, J., dissenting).[8]

The Government has also asserted that it must protect the interests of nongambling States in discouraging gambling activities by their citizens. Such an interest in imposing the public policy of some States onto others stands in sharp contrast to the "federalism" interest the Government previously asserted to justify the same statute.[9] *See United States v.*

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authorized in an increasing number of States. *See Lotteries*, Staff Report of National Gambling Impact Study Commission, *available at* <http://www.ngisc.gov/research/lotteries.html.>

[7] *See* 25 U.S.C. § 2701 *et seq.* As of December 31, 1996, 184 Indian Tribal Governments operated casinos and other forms of gambling in 24 States. *Native American Gaming*, Staff Report of National Gambling Impact Study Commission, *available at* <http://www.ngisc.gov/research/nagaming.html.>

[8] The majority in *Posadas* accepted Puerto Rico's asserted interest in discouraging its residents from engaging in casino gambling as substantial, but the Court has since disavowed reliance on deference to such unsupported legislative determinations. *See 44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J., plurality op.) ("on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis"); *id.* at 1522 (O'Connor, J., concurring) ("[s]ince *Posadas*, . . . this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny.").

[9] Viewed somewhat differently, the statutory ban on private casino advertising may operate to the benefit of States and Indian Tribal

Edge Broadcasting Co., 509 U.S. 418, 423 (1993) (government asserted that the statute was intended " 'to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States' ") (quoting S. Rep. No. 93-1404 at 2 (1974)). The statutory scheme, moreover, flatly contradicts the Government's asserted solicitude for nongambling States. The Federal Government has compelled *all* States to accept Indian Tribal gaming, and that gaming, including Indian Tribal casino gambling, may be freely advertised. *See* 25 U.S.C. § 2710; 47 C.F.R. § 73.1211(c)(3) (excluding Indian Tribal gaming from broadcast advertising ban). The Government cannot credibly claim an interest in *protecting* States from public participation in gambling activities while simultaneously *imposing* those very activities on the States.

The Government asserted a third interest at the eleventh hour of this litigation in protecting compulsive gamblers, an interest even the Fifth Circuit majority found to be unsupported and posited too late for judicial consideration. 149 F.3d at 338-39. The Government obviously is attempting to take advantage of scattered lower court decisions evading this Court's requirements by turning away from the First Amendment on this issue and focusing instead on the impact of commercial speech on what are claimed to be the most vulnerable potential recipients.[10] Government, according to these

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Governments that sponsor (and may purchase broadcast advertising to promote) their own gambling activities by precluding their private competitors from advertising on radio and television. The Federal Government has no legitimate interest in favoring State and Indian Tribal Governments over private individuals as sponsors of commercial speech, but in any event the Government has failed to assert any federalism interest that would justify the ban on private casino advertising.

[10] *See, e.g., Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 328-29 (4th Cir. 1996) (reaffirming on remand a Baltimore ban on billboard advertising of alcohol beverages because the city "attempts to protect its children in a manner and with a motive distinct from those evidenced by Rhode Island in *44 Liquormart* and in accord with an unbroken chain of Supreme Court cases which indicate its desire to ensure that children do not

courts, may restrict commercial speech as long as it asserts an interest in protecting an "eggshell ear" audience, particularly children. The Fifth Circuit majority, while expressly rejecting the Government's "assertions concerning compulsive gambling, intuitively sensible though some of them are," *id.* at 338, nevertheless concluded that if the statutory ban were not upheld, "communities will be less capable of *insulating themselves and their children* from the deleterious influence of gambling" and that "[d]octrinal rigidity" would preclude "peoples' right to make choices *to protect their community and their children*." *Id.* at 341 (emphasis added).

States unquestionably have an interest in protecting children and preventing abuse of many otherwise lawful products and services, but this Court has never sanctioned "lowest common denominator" protection for speech, much less authorized lower courts to fabricate such a justification for speech restrictions out of whole cloth. To the contrary, the Court has consistently concluded that the Constitution does not permit the Government to tailor speech intended for the general public to the needs or tastes of a fragile few. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) ("the government may not 'reduce the adult population . . . to reading only what is fit for children' ") (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). Nor may the Government avoid strict application of First Amendment principles to protect the interests of persons who are allegedly more susceptible to misuse of the advertised product or service. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (holding that Government may not bar adults from receiving "indecent" but constitutionally protected speech in an asserted effort to protect children).

Courts too often gloss over the "substantial interest" requirement of this Court's commercial speech analysis – or

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become lost in the marketplace of ideas"), *cert. denied*, 117 S. Ct. 1569 (1997); *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998) (finding government had substantial interest in protecting children from profane advertising); *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp. 2d 1225 (W.D. Wash. 1998).

worse, use an asserted interest in (or the court's own supposition of) protecting vulnerable potential recipients to trump the remaining *Central Hudson* inquiry. The Court should once again reaffirm that Government or judicial solicitude for the highly susceptible cannot substitute for a genuine and legitimate governmental interest and proof that the harms any commercial speech purports to remedy or prevent are real.

III. THE GOVERNMENT HAS NOT SATISFIED AND CANNOT SATISFY ITS BURDEN TO PROVE THE CONSTITUTIONAL PERMISSIBILITY OF ITS ADVERTISING BAN.

The Government must prove not only that a substantial government interest underlies its ban on private casino advertising but that the ban directly and materially advances, and is narrowly tailored to further, that interest. The Government has not satisfied and cannot satisfy its burden of proof. Indeed, the Government failed even to present evidence on these issues. The Fifth Circuit's decisions upholding the advertising ban disregarded this Court's rejection of legislative deference, and conclusively presumed that the advertising ban directly and materially advanced, and "reasonably fit," the Government's goal of reducing public participation in gambling activities. The Court, therefore, should unambiguously require that governmental entities prove, through evidence presented and weighed in a court of law, that any restrictions on commercial speech directly advance a legitimate and substantial governmental interest to a material degree and that the restrictions are narrowly tailored to further that interest in light of available alternatives that do not impact speech.

A. The Government Must Prove That Its Advertising Ban Directly and Materially Advances a Substantial Interest and Cannot Rely on Presumptions to Satisfy Its Burden of Proof.

The Court has made it abundantly clear with respect to the third *Central Hudson* factor that the State bears the burden to *prove* – through evidence, as opposed to presumptions, speculation, or conjecture – that any restrictions on commercial speech directly advance a substantial governmental interest in a material way.

> [T]he Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Rubin v. Coors Brewing, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 770-71); *accord Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136, 143 (1994). "Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield*, 507 U.S. at 771; *Rubin*, 514 U.S. at 487; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Despite this Court's repeated admonition to hold the Government to its burden of proof, the Fifth Circuit majority found that the Government satisfied the third *Central Hudson* factor entirely on the basis of presumptions, without any evidentiary showing that the advertising ban directly and materially advanced the Government's asserted interests. The majority initially concluded, "It is axiomatic that the purpose and effect of advertising is to increase consumer demand. As noted in both *Posadas* and *Edge*, the vigor with which the

statute has been challenged confirms the efficacy of the prohibition." 69 F.3d at 1301. On remand for reconsideration in light of *44 Liquormart* and the Court's abandonment of the constitutional analysis in *Posadas*, the majority continued to adhere to this view "for the reasons stated in our previous opinion." 149 F.3d at 338.[11] Rather than requiring proof through evidence, the Fifth Circuit simply adopted the conclusive presumptions that advertising always increases consumption and that by challenging an advertising ban, plaintiffs concede that it advances a governmental interest in reducing consumption. Such presumptions are antithetical to this Court's commercial speech jurisprudence and would eviscerate protection for such speech.

The genesis of these presumptions is in *Central Hudson* itself, in which the Court found "an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order." 447 U.S. at 569. Central Hudson, however, was a monopoly provider of electricity seeking to engage in promotional advertising, *i.e.*, "advertising intended to stimulate the purchase of utility services." *Id.* at 559. By definition there was a plausible connection between such advertising and the consumption of electricity: Only one source existed for such electricity, and thus any increase in Central Hudson's sales necessarily would increase overall consumption.

This case-specific concept, however, lost its moorings in *Posadas*, in which the Court deferred to an unstated and unsupported legislative belief that

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[11] The majority also reiterated its beliefs that "the broadcast advertising ban in § 1304 directly advances the government's policies must be evident from the casinos' vigorous pursuit of litigation to overturn it," *id.*, and "regulation of promotional advertising directly influences consumer demand, as compared with the indirect market effect criticized in *44 Liquormart*." *Id.* at 340.

> advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.

478 U.S. at 342 (citing *Central Hudson*, 447 U.S. at 569); *accord Edge Broadcasting*, 509 U.S. at 434. Suddenly and without analysis, the link between advertising and overall consumption in a *monopoly* market became applicable to advertising in a *competitive* market, and a litigant's right to advertise in order to preserve or increase its market *share* was equated to a desire to increase consumption in the market as a *whole*. Moreover, it was regarded, without proof, as always producing that effect.

Such an assumption ignores the realities of the commercial marketplace, where advertising serves a multitude of purposes and market participants often will advertise their products or services to obtain business at the expense of competitors, not necessarily to stimulate any additional consumer demand.[12] Nor does any association between advertising and consumption, even if proven, establish that the *harms* the Government must prove will necessarily diminish as a direct result of a decrease in commercial speech. Here, for example, a proper application of the *Central Hudson* test requires the Government to prove not just that a ban on

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[12] For example, advertising in support of political candidates (although "political," as opposed to "commercial" speech) has steadily increased, yet voter turn-out continues to decline. *See, e.g.*, Will Lester, Associated Press, *Nationwide Voter Turnout in '98 Election Was Lowest in 54 Years*, The Seattle Times, Feb. 10, 1999 (observing that turnout was low in several notably expensive races). Politicians and their supporters nevertheless continue to spend significant sums on advertising – and to fight vigorously for the right to do so – even though such advertising does not result in greater overall voter participation because the objective is to obtain more votes for them than for their opponents.

advertising private casinos reduces public participation in gambling activities but that this reduction, in turn, substantially remedies any social ills that the Government proves are directly tied to such public participation.

The Court in its most recent opinions has begun to recognize these realities and, in addition to disowning the legislative deference accepted in *Posadas* and *Edge Broadcasting*, has required proof of any asserted connection between advertising, consumption, and the Government-asserted harms. *See 44 Liquormart*, 517 U.S. at 505-06 (Stevens, J., plurality op.) (concluding that while a ban on price advertising for alcohol beverages "may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption"); *Rubin*, 514 U.S. at 487-88 (the " 'common sense' " idea that "a restriction on the advertising of a product characteristic will decrease the extent to which consumers will select a product on the basis of that trait" held insufficient to prove direct and material advancement of the asserted Government interest).

While this Court has thus cabined *Posadas* and *Edge Broadcasting*, the Fifth Circuit and many other courts have continued to accept presumptions that preclude compilation and judicial review of the evidentiary record this Court has demanded.[13] The Government in this case introduced *no evidence* to demonstrate that banning advertising would have any impact on public participation in gambling activities, yet the Fifth Circuit majority conclusively presumed such an impact. Such a presumption flies in the face of this Court's recent

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[13] *See, e.g., Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996), *reaff'd*, 101 F.3d 325 (4th Cir. 1996) (concluding *no judicial factual findings* are required on *any* aspect of *Central Hudson* test, and that courts may uphold restrictions on commercial speech based solely on presumptions and materials gathered during legislative process), *cert. denied*, 117 S. Ct. 1569 (1997).

commercial speech decisions, which have flatly rejected legislative deference, necessarily precluding indirect deference to legislative judgments through the improper use of conclusive presumptions.[14] Practically speaking, judicial invocation of such presumptions eliminates the third *Central Hudson* factor altogether because the fact that anyone challenged a restriction on commercial speech would conclusively demonstrate that the restriction is effective. Acceptance of the Fifth Circuit majority's analysis would allow the Government to merely posit an evil and then regulate advertising by presuming that the offending conduct is thereby promoted. Having overruled *Posadas* in *Rubin* and *44 Liquormart*, the Court should not allow the lower courts and Government to resurrect it in this fashion. The Court, therefore, should use this opportunity to reaffirm, specifically and expressly, that the Government may not rely on presumptions but must prove, *by evidence presented and weighed in a court of law*, that its commercial speech restriction directly advances a substantial interest in a material way.

The Government has not made the requisite showing here, nor could it, in light of the numerous statutory exceptions to its advertising ban. The statute bans advertising of

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[14] The Fifth Circuit opinion and similar decisions even exceed the bounds of evidentiary presumptions. Such presumptions allocate the burden of producing evidence among the parties and are not themselves evidence of a disputed fact. *See, e.g., Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1581 (Fed. Cir. 1984) ("Presumptions of fact . . . arise out of considerations of fairness, public policy, and probability, and are useful devices for allocating the burden of production of evidence between the parties."). Contrary to the abuse of this concept by some courts, a proper evidentiary presumption, without more, cannot establish a disputed issue of fact. Even proper application of this principle, however, is inappropriate in the context of the First Amendment. A presumption that requires those who challenge restrictions on commercial speech to first produce evidence of the restriction's ineffectiveness would turn on its head the Court's requirement that the government must bear the burden to prove the permissibility of its commercial speech restrictions.

private casino gambling while permitting such advertising for casino and other gambling activities on Indian reservations, State-sponsored lotteries, and other gaming. 18 U.S.C. §§ 1301-08; 47 C.F.R. § 73.1211. The Government produced no evidence to demonstrate that "compulsive gambling" or other alleged social ills are associated with commercial casinos any more than with Indian, State, or other private gaming operations. Yet, the Government compels States to accommodate Indian Tribal gaming and allows those Tribes, as well as States that sponsor lotteries, to advertise freely. Neither evidence nor logic supports the Government's position that a ban on advertising private casinos will have any impact whatsoever on public participation in gambling activities under these circumstances.

This Court recently concluded in the context of a similar statutory scheme that "[t]here is little chance that [a regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Rubin v. Coors Brewing*, 514 U.S. at 489. The Government's inconsistent ban on gambling advertising, therefore, cannot directly and materially advance any legitimate governmental interest. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1336 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998); *Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 506-07 (D.N.J. 1997), *cert. denied*, ___ S. Ct. ___, 1999 WL 8447 (Jan. 11, 1999) (No. 98-721) (Third Circuit appeal pending). Accordingly, the Court should reverse the Fifth Circuit's decision and strike down the ban on advertising by private casinos as fatally inconsistent with the First Amendment.

B. The Government Cannot Prove the Challenged Restriction Is Narrowly Tailored to Advance Its Substantial Interest, and May Not Selectively Ban Forms of Commercial Speech to Accomplish Its Asserted Goals.

The fourth *Central Hudson* factor requires that the Government prove that its restriction on speech is no more extensive than necessary to serve its asserted substantial interest. *E.g.*, *Rubin v. Coors Brewing*, 514 U.S. at 490-91. The Court reaffirmed in *44 Liquormart* that the Government must be put to its proof to demonstrate narrow tailoring between its means and its ends. As Justice O'Connor stated in that case on behalf of four Justices,

> While the State need not employ the least restrictive means to accomplish its goal, the fit between means and end must be "narrowly tailored." The scope of the restriction on speech must be reasonably, though it need not be perfectly, targeted to address the harm intended to be regulated. The State's regulation must indicate a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.

517 U.S. at 529 (citations omitted); *see id.* at 508-11 (Stevens, J., plurality op.); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

The Fifth Circuit majority purported to recognize that in the wake of *44 Liquormart*, the fourth *Central Hudson* factor "has become a tougher standard for the state to satisfy." 149 F.3d at 338. It failed, however, to apply this "tougher standard" in any meaningful way. Instead, the lower court majority attempted to make a constitutional silk purse out of a

sow's ear, citing the gambling advertising ban's fragmented statutory scheme as evidence of a "reasonable fit":

> The federal government's policy toward legalized gambling is consciously ambivalent. What began as a prohibition on all interstate lottery advertising has been successively, but gingerly modified to respect varying state policies and the federal government's encouragement of Indian commercial gambling. The remaining advertising limits reflect congressional recognition that gambling has historically been considered a vice; that it may be an addictive activity; that the consequences of compulsive gambling addiction affect children, the family, and society; and that organized crime is often involved in legalized gambling.

Id. at 339 (footnotes omitted). No longer able to rely expressly on *Posadas*, the majority then turned to *Edge Broadcasting* to reaffirm its prior decision, drawing the "inference" from the Court's opinion in that case that "if the federal government may pursue a cautious policy toward the promotion of commercial gambling, then it may use one means at its disposal – a restriction on broadcast advertising – to control demand for the activity." *Id.* at 340 (footnote omitted).

Nothing in this Court's opinion in *Edge Broadcasting* supports the Fifth Circuit's "inference" that the Government may selectively ban commercial speech sponsored by private casinos while permitting the same commercial speech sponsored by Indian Tribal casinos and State-sponsored lotteries. The Court in *Edge Broadcasting* held only that a restriction on lottery advertising by broadcasters located in nonlottery States "reasonably fit" the Government's interest in both respecting the policy of such States and accommodating the interests of lottery States, even in circumstances in which the bulk of the broadcaster's audience is in a lottery State.[15] 509

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[15] Though *Amici* believe *Edge Broadcasting* was wrongly decided and that an express repudiation of its analysis would help guide lower

U.S. at 429-30. Indeed, apart from that bare conclusion, the Court in *Edge Broadcasting* engaged in no analysis of the fourth *Central Hudson* factor, and instead focused entirely on the third factor of direct advancement. *See id.* (restating its fourth factor conclusion that "applying the restriction to a broadcaster such as Edge *directly advances* the governmental interest").

This Court now requires a "closer look," *44 Liquormart*, 517 U.S. at 530 (O'Connor, J., concurring), than the analysis in which it engaged in *Edge Broadcasting*. The Court has disowned the deference to the "incremental" or selective advancement of governmental objectives through speech restrictions on which it relied in both *Posadas* and *Edge Broadcasting*. As Justice Stevens explained,

> Given our longstanding hostility to commercial speech regulation of this type, Posadas clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. The Posadas majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available.

44 Liquormart, 517 U.S. at 509-10 (Stevens, J., plurality op.); *accord id.* at 1522 (O'Connor, J., concurring). Although specific to *Posadas*, the Justices' rejection of that line of reasoning also should preclude any reliance on *Edge Broadcasting*

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courts in properly evaluating commercial speech restrictions in the future, this Court certainly could reverse the Fifth Circuit in this case without overruling *Edge Broadcasting*. As Justice Stevens, writing for four Justices, recognized in *44 Liquormart*, the holding in *Edge Broadcasting* affected only "advertising about an activity that had been deemed *illegal* in the jurisdiction in which the broadcaster was located." 517 U.S. at 509 (emphasis added). This case is distinguishable: The issue is whether broadcasters may advertise an activity that is *legal* in the jurisdiction where they are located.

for the discredited proposition that courts may defer to Congressional judgments on how best to accomplish governmental ends, rather than insisting that the Government prove that no reasonable non-speech related alternatives exist to banning speech. Here, on the other hand, the Government chose speech restrictions as its first, and only, regulatory alternative.

The Fifth Circuit majority also refused to consider the "availability of less burdensome alternatives to reach the stated goal," which the Court has reaffirmed is a critical aspect of the *Central Hudson* analysis. *44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring); *id.* at 508-11 (Stevens, J., plurality op.). The lower court concluded that "the efficacy of non-advertising-related means of discouraging casino gambling is purely hypothetical, as such measures would have to compete with the message of social approbation that would simultaneously be conveyed by unbridled broadcast advertising." 149 F.3d at 340. The Fifth Circuit thus not only relieved the Government entirely of its burden to prove that a ban on speech is narrowly tailored to its asserted interests, but dismissed out of hand even the *possibility* that alternatives might be effective, on the very strange hypothesis that by not banning advertising sponsored by the private casino owners, the Government would be perceived as endorsing it. Such a concept is nothing less than extraordinary and would eviscerate the fourth *Central Hudson* factor for commercial speech about any activity the Government does not favor.

Congress has obvious other methods at its disposal that would more directly accomplish an interest in reducing demand for gambling activities in States where all such activities are illegal. Most obviously, the Government could sponsor its own speech to warn or educate the public on the social ills the Government believes arise from excessive gambling. Congress also could provide funding for State efforts to enforce non-speech-related regulations on gambling activities and the alleged social harms associated with such activities, as well as enact and enforce its own regulations consistent with its Commerce Clause authority. Indeed, Congress has

established a commission to study and recommend just such alternatives. *See* National Gambling Impact Study Commission Act, Pub. L. No. 104-169 (1996). "The ready availability of such alternatives . . . demonstrates that the fit between ends and means is not narrowly tailored." *44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., concurring).[16]

Finally, the Fifth Circuit majority vainly attempts to distinguish the analysis in *44 Liquormart* by stating that the government's restriction on gambling advertising, unlike the alcohol beverage price restriction at issue in *44 Liquormart*, is not a "blanket ban on advertising" and thus is "more analogous to a time, place and manner restriction. Other media remain available, such as newspapers, magazines and billboards, and indeed broadcast advertising of casinos, without reference to gambling, is permitted." 149 F.3d at 340. The Fifth Circuit majority mischaracterizes the plain language of the statute, which effectively bans *all* private casino gambling advertising in any medium, including "[a]ny newspaper, circular, pamphlet, or publication of any kind." 18 U.S.C. § 1302. More fundamentally, this Court has flatly rejected the Fifth Circuit majority's rationale, which is irreconcilable with both the Court's commercial speech jurisprudence and the constitutional analysis of time, place, and manner restrictions on other forms of protected speech.

"[T]he essence of time, place, or manner restrictions lies in the recognition that various methods of speech, *regardless of their content*, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares

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[16] *Accord Players Int'l, Inc. v. United States*, 988 F. Supp. 497, 506-07 (D.N.J. 1997), *cert. denied*, ___ S. Ct. ___, 1999 WL 8447 (Jan. 11, 1999) (No. 98-721) (Third Circuit appeal pending). *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (availability of options indicates restriction is more extensive than necessary); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18 (failure to consider alternative methods of furthering interests shows government did not "carefully calculate" burden on speech, and is evidence the "fit" between ends and means is not reasonable) (1993); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

at 2 a.m. disturbs neighborhood tranquility." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) (emphasis added). Such restrictions thus must be content neutral, *i.e.*, "not based upon either the content or subject matter" of the regulated speech. *Id.* Restrictions on commercial speech, in sharp contrast, are by definition government regulation based on the content and subject matter of the speech. The Court, therefore, has consistently refused to uphold bans on commercial speech as reasonable time, place, and manner restrictions. In *Discovery Network*, the Court struck down a city ban on newsracks containing commercial publications despite the Government's claim that its interest in safety and esthetics was unrelated to the content of the publications and the publishers had alternative means of distributing their publications.

> The argument is unpersuasive because the very basis for the regulation is the difference between ordinary newspapers and commercial speech. . . . Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside the newsrack. Thus, by any commonsense understanding of the term, the ban in this case is "content based."

507 U.S. at 429. The Court concluded that the ban was neither content neutral nor narrowly tailored, and "[t]hus, regardless of whether or not it leaves open ample alternative channels of communication, it cannot be justified as a legitimate time, place, or manner restriction on protected speech." *Id.* at 430; *accord Edenfield*, 507 U.S. at 773; *Virginia Pharmacy*, 425 U.S. at 771. Furthermore, even if the ban on gambling advertising left open reasonable alternative media for expression (which it does not), a restriction on the time, place or manner of speech cannot be justified merely because the Government has not foreclosed all avenues of speech. *See, e.g., Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."); *accord Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2348-49 (1997).

The Government's advertising ban specifically targets private casino advertising based on the content of that advertising and is not narrowly tailored to the Government's asserted interests in light of the ready availability of alternative means of pursuing the Government's asserted interests. The Fifth Circuit majority cannot nullify the rigors of this Court's *Central Hudson* requirements by relying on rejected and inapplicable doctrines or by deferring to legislative judgments on how best to accomplish the Government's purported ends. The federal advertising ban on private casino gambling, therefore, cannot survive constitutional scrutiny under a proper application of the Court's *Central Hudson* test and should be declared unconstitutional.

CONCLUSION

In *44 Liquormart*, this Court made clear – albeit in four separate opinions – that the full measure of First Amendment protection afforded to commercial speech cannot be diluted by evidentiary presumptions, by deference to unproven legislative or judicial beliefs, or by unsubstantiated assertions that censorship is necessary to protect a vulnerable audience. The Court's recent cases instruct that the Government is required to prove – with hard evidence, not with slogans about the alleged harm caused by advertising – that a speech restriction directly and materially advances a substantial interest, and is narrowly tailored to serve that interest. The Fifth Circuit failed to put the Government to its proof, upholding a complete ban on advertising about a lawful activity using an analysis that mimics *Posadas* and other discredited approaches to commercial speech. The Fifth Circuit also ignored the internal inconsistencies of the statutory scheme at issue here – inconsistencies which would be fatal to the Government's effort to justify the advertising ban even if it had some evidence to support its assertions that the ban in fact directly advanced some substantial interest. The opinion below, and other similar opinions cited in this brief, show that lower courts have resisted protecting commercial speech from Government interference to the full extent required by this

Court. *Amici* respectfully request that this Court reverse the judgment below, and do so in a manner that unequivocally instructs the lower courts on the stringent First Amendment standard that must be applied to commercial speech restrictions.

Respectfully submitted.

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APPENDIX

IDENTITY OF INDIVIDUAL *AMICI CURIAE*

American Association of Advertising Agencies ("AAAA"), founded in 1917, is the trade association for the advertising agency business. Its membership is comprised of over 550 advertising and communications agencies with over 1300 offices throughout the United States. AAAA members create and place over 75 percent of all national advertising and the majority of local and regional advertising in all 50 states. More than 150 AAAA members have clients in the gaming and related industries, with accounts representing state lotteries, pari-mutual betting, casinos, and Native American gaming activities. AAAA is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with all efforts to restrict commercial speech.

American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has vigorously defended the free speech principles of the First Amendment and has appeared before this Court on numerous occasions, both as direct counsel and as amicus curiae, in cases challenging governmental actions that threaten First Amendment rights. The ACLU and its members have a vital interest in the outcome of this case because it raises fundamental questions about whether, and to what extent, the First Amendment permits government to suppress truthful

and non-misleading information about lawful products and services.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership approximately 200 domestic magazine publishers who publish over 1,200 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment right to engage in truthful commercial speech about lawful products and services.

The Media Institute (the "Institute") is an independent, nonprofit research organization that advocates a strong First Amendment and full constitutional protection for commercial speech. The Institute has participated in select cases in federal district and circuit courts and the U.S. Supreme Court. The Institute also conducts research and produces publications relating to the First Amendment and other aspects of communications policy, including the annual *The First Amendment and the Media* and the quarterly *Commercial Speech Digest*.

National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade organization that serves and represents radio and television stations and networks. NAB's members cover, produce, and broadcast the news and other programming to the

American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning commercial activities, the activities of government and other matters of public interest and concern.

National Newspaper Association ("NNA"), established in 1885, is a not-for-profit trade association representing the owners, publishers and editors of America's community newspapers. NNA's mission is to protect, promote and enhance America's community newspapers. Today, NNA's 4,000 members make it the largest newspaper association in the United States. NNA works closely with policy officials to create a legal and regulatory environment conducive to the growth of community newspapers, including full First Amendment protection for non-misleading, truthful advertising of products and services.

Newspaper Association of America ("NAA") is a non-profit organization representing the interests of more than 1,700 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for approximately 87 percent of the U.S. daily newspaper circulation. One of NAA's key strategic priorities is to advance newspapers' interests in First Amendment issues, including the ability to publish information about lawful products and services.

Outdoor Advertising Association of America, Inc. ("OAAA"), founded in 1881, is the principal trade association for the outdoor advertising industry. The outdoor advertising industry has disseminated advertisements that are the subject of this lawsuit, and anticipates doing

so in the future. OAAA's 800 members consist of domestic and international outdoor and out-of-home operators, suppliers and advertisers.